Office-Supreme Court, U.S.
FILED
JUN 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1350

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,
Petitioner,

vs.

CITY OF BOULDER, COLORADO,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMICI CURIAE BRIEF FOR THE CITY OF AKRON, OHIO AND THE OHIO WATER DEVELOPMENT AUTHORITY

SQUIRE, SANDERS & DEMPSEY
JOHN D. CUMMINS
GLENN M. YOUNG
Counsel of Record
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 862-7000

EBEN G. CRAWFORD
WILLIAM H. BAUGHMAN
1800 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-9200

Attorneys for the Ohio Water Development Authority

ROBERT D. PRITT
Director of Law
City of Akron
304 Municipal Building
Akron, Ohio 44308
(216) 375-2030

Attorney for the City of Akron

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	i
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	6
CONCLUSION	21

TABLE OF AUTHORITIES

Cases

Brandel v. Lawrenceburg, 249 Ind. 47, 230 N.E.2d 778, 781 (1967) 19

Burns v. City of Enid, 92 Okla. 67, 217 P.1038, 1039 (1923) 19

California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 319-22 (1905) 16

Canton v. Van Voorhis, 61 Ohio App. 419, 421-22, 22 N.E.2d 651, 652, appeal dismissed for want of debatable question, 135 Ohio St. 319, 20 N.E.2d 720 (1939) 17

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 17

Page

District of Columbia v. Brooke, 214 U.S. 138, 148 (1909) 19

Dover Township v. Witt, 7 N.J. Super. 259, 72 A.2d 884, 885 (1950) 18

Gardner v. Michigan, 199 U.S. 325, 332-33 (1905) 16

Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N.D. Ohio 1979), appeal docketed sub nom. Hybud Equipment Corp. v. City of Akron, No. 80-3121 (6th Cir. Jan. 14, 1980) 16

Grand Rapids v. DeVries, 123 Mich. 570, 82 N.W. 269, 273-74 (1900) 19

Hodge v. Stout, 377 F.Supp. 131, 135 (E.D. Tenn. 1974) 19

Hutchison v. Valdosta, 227 U.S. 303 (1912) 19

Indianapolis v. Ryan, 212 Ind. 447, 7 N.E.2d 974, 976 (1937) 19

Marangi Brothers v. Board of Commissioners, 33 N.J. Super. 294, 110 A.2d 131, 138-39 (1954) 19

O'Neal v. Harrison, 96 Kan. 339, 150 P.551 (1915) 19

Parker v. Brown, 317 U.S. 341 (1943) 4, 17

People v. A & C Trucking Co., 88 Misc. 2d 988, 390 N.Y.S.2d 987, 992-94 (1977) 19

Page

People v. Butcher, 28 Misc.2d 24, 209 N.Y.S.2d 723, 728 (1960) 19

Sikeston v. Sisson, 363 Mo. 104, 249 S.W.2d 345, 346-47 (1952) 19

Silver v. Los Angeles, 217 Cal. App.2d 134, 31 Cal.Rptr. 545, 549-50 (1963) 18

Spokane v. Carlson, 73 Wash. 2d 76, 436 P.2d 454, 456 (1968) 19

State v. Orr, 68 Conn. 101, 35 A.770, 771 (1896) 19

State v. Robb, 100 Me. 180, 60 A.874, 877 (1905) 19

State, ex rel. Moock v. Cincinnati, 120 Ohio St. 500, 508-09, 166 N.E. 583, 585-86, cert. denied, 280 U.S. 578 (1929) 16

Strub v. Deerfield, 19 Ill.2d 401, 167 N.E.2d 178, 180 (1960) 18

United Sanitation Services, Inc. v. Tampa, 302 So.2d 435, 436 (Fla.Ct.App. 1974) 18

Valley Spring Hog Ranch Co. v. Plagman, 282 Mo. 1, 220 S.W.1, 4-5 (1920) 18

Wheeler v. City of Boston, 233 Mass. 275, 123 N.E. 684, 686 (1919) 18

Constitutional Provisions, Statutes and Ordinances

	Page
Ohio Const. Art. IVII, Sec. 3 (Page's 1979)	9
Toxic Substances Control Act, 15 U.S.C. §2601, *et seq.*	7
Clean Water Act, 33 U.S.C. §1251 *et seq.*	7
Safe Drinking Water Act, 42 U.S.C. §300F *et seq.*	7
Resource Conservation and Recovery Act, 42 U.S.C. §6901, *et seq.*	7
Clean Air Act, 42 U.S.C. §7401, *et seq.*	7
Ohio Rev. Code Ann. §§6121.03 and 6123.03 (Page's 1977)	9

No. 80-1350

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,
Petitioner,

vs.

CITY OF BOULDER, COLORADO,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMICI CURIARE BRIEF FOR THE CITY OF AKRON, OHIO AND THE OHIO WATER DEVELOPMENT AUTHORITY

INTEREST OF AMICI CURIAE

The City of Akron, a home-rule municipality in Ohio, and the Ohio Water Development Authority (OWDA), a state agency

created inter alia to assist in financing solid-waste disposal systems, join in this brief as amici curiae in support of Respondent. These amici also adopt the brief filed herein by Respondent.

In addition to their general interest in conducting their governmental affairs free of fear that their actions may be challenged as antitrust violations, these amici are also interested in this case because they are presently subjected to antitrust litigation arising from their allegedly illegal, inter-government agreement. That agreement was part of a financing relationship between Akron and OWDA for the purpose of constructing a new resource recovery solid-waste disposal system built in Akron and financed through the OWDA. Specifically, Akron agreed with OWDA that it would adopt an ordinance requiring that all solid waste collected

within the city limits be taken to the new facility. OWDA insisted upon adoption of this ordinance to insure that all of Akron's solid waste would be disposed of in an environmentally sound manner and to insure adequate utilization of the facility to serve the revenue bonds OWDA issued to finance the project. After the ordinance was adopted, certain landfill operators and solid waste haulers sued Akron and OWDA asserting, inter alia, that the ordinance imposed an anticompetitive restraint upon the business of collecting and disposing of solid waste and constituted an attempt to monopolize that business, all in violation of Sections 1 and 2 of the Sherman Act. After trial on the merits, the District Court rejected plaintiffs' antitrust claims on the ground, inter alia, that the people of Ohio, through the home rule provisions of the Ohio Constitution, had allocated the

power to regulate the collection and disposal of solid waste within a city's corporate limits to the city's council, not the state legislature; that accordingly the Akron council, in adopting the ordinance, stood in the same position and exercised the same sovereign power as the state legislature exercises in those areas to which the people of Ohio have allocated it power to legislate; and that therefore, the ordinance was immune from antitrust attack under Parker v. Brown, 317 U.S. 341 (1943); Glenwillow Landfill, Inc. v. City of Akron, 385 F.Supp. 671 (N.D. Ohio 1979). The case has been appealed and was argued to the Sixth Circuit Court of Appeals in October, 1980, sub nom. Hybud Equipment Corp. v. City of Akron, No. 80-3121 (6th Cir. Jan. 14, 1980). No decision has yet been rendered, presumably due to the pendency of the instant appeal before this Court.

Although the issues before the Sixth Circuit are not identical to those presented here, these amici find themselves in much the same position as the City of Boulder - having to defend an antitrust lawsuit attacking a governmental action well within the scope of the home-rule power granted a municipality by the people.

The ability of local government to solve the problems of urban communities is already strained because of the limited sources of funds available to meet the increasing demands for government services in our society. To apply the Sherman and Clayton Acts to exercises of home-rule power by municipalities - and thus create another obstacle to local government's attempts to fulfill the needs of an urban citizenry - would be exceedingly unwise.

It is this interest in maintaining their ability to address present-day urban

problems, expecially in the area of providing solid-waste removal systems, that prompts these amici to file this brief and to join in respondent's brief.

SUMMARY OF ARGUMENT

Applying federal antitrust statutes to governmental actions by local governments under their home-rule power will unduly interfere with the accomplishment of important social goals, e.g., environmental goals, as is illustrated by these amici's own situation.

ARGUMENT

These amici support the arguments contained in respondent's brief. For those reasons, the federal antitrust statutes should be read as not reaching actions taken by local governments under sovereign, home-rule power vested in them by the people. In addition, these amici will offer as an example a description of one area of

local government where the risk of antitrust litigation would impede efforts to accomplish vital societal goals. That area is the traditional one of collecting and disposing of garbage, trash and other refuse.

In the past decade, Congress has enacted numerous laws designed to improve the nation's environment.1/ Most of these statutes apply with equal, if not greater, force to municipalities as to industry. For instance, Congress has decided to utilize existing municipal sewage treatment plants as a primary tool in clensing the waters of the United States of industrial as well as residential waste.2/ These more strict

---

1/ Clean Air Act, 42 U.S.C. § 7401 et seq.; Clean Water Act, 33 U.S.C § 1251 et seq.; Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.; Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.; Safe Drinking Water Act, 42 U.S.C. § 300F et seq.

2/ See 33 U.S.C. §§1251(a)(4), 1281(c) and (e) and 1317 (b) and (c).

environmental requirements have greatly increased the traditional burden on the nation's local governments to provide waste removal systems. Merely hauling trash to any open landfill to be burned or buried is no longer enough.3/ A more environmentally acceptable method of disposal is necessary.

Akron, like cities throughout Ohio and the nation, faces the challenge of disposing of waste in accordance with these new environmental regulations. In meeting the challenge, Akron, as a charter municipality, can use its home-rule power under the Ohio Constitution. Home-rule is granted to municipalities in Ohio by the following constitutional provision:

> "Municipalities shall have authority to exercise all powers of self-government and to adopt and enforce within their limits, such local police, sanitary and

---

3/ See Resource Conservation and Recovery Act, 42 U.S.C. § 6945(c): ". . . open dumping of solid wastes or hazardous waste is prohibited . . ."

other other similar regulations as are not in conflict with the general laws."4/

Akron may also call upon the OWDA for assistance in financing capital improvements to dispose of waste without degrading the environment. The OWDA's very existence is a response tc the financial needs in meeting these new environmental requirements through the construction of new disposal or treatment systems.5/

A discussion of Akron's solid-waste program will illustrate the need for what in the private sector might be circumscribed by the antitrust laws. The intergovernmental cooperation between OWDA and Akron, which is allegedly a combination in restraint of trade, is only one example of the relationships and restrictions that are needed,

---

4/ Ohio Const. Art. IVIII, Sec. 3 (Page's 1979).

5/ Ohio Rev. Code Ann. §§ 6121.03 and 6123.03 (Page's 1977).

especially in the environmental area, to deal economically, safely and effectively with the many present day problems that beset local government.

In the early 1970's Akron's officials foresaw an impending solid waste disposal crisis principally triggered by (a) Ohio's new stringent solid waste disposal regulations which placed substantial constraints on the future location and operation of waste disposal sites, and (b) the fast diminishing capacity of existing landfill sites in the Akron area.

In response, Akron undertook extensive studies of alternative, long-range solutions including sanitary landfill, incineration, composting, rail haul to abandoned strip mines, size and volume reduction mehtods (shredding, crushing, etc.), and resource recovery techniques. Akron concluded that a recycle energy system (RES), designed with

the latest technology to incinerate solid waste to produce marketable steam or electricity, was the best long-range solution to the solid waste disposal problem for a number of reasons, including the facts that:

1. An RES could be centrally located within the corporate limits, thereby obviating costly hauling and assuring that Akron retained control over the facility;

2. The ash residue produced by the RES could be used for fill or safely landfilled requiring the utilization of far less land than ordinary landfilling.

3. Incineration would markedly reduce the pollution and nuisances associated with landfills and, to the extent it replaced coal fire burners, would actually reduce air pollution.

4. The costs of operation could be offset by the sale of steam or electricity and recyclable materials as well as the collection of a disposal charge.

A significant factor in Akron's decision was the fact that its only landfill generated continuing problems, controversy and litigation. Indeed, in order to settle

pending litigation, Akron had been forced to agree to cease operating its landfill no later than December 1977.

During the first half of 1975, Akron attempted to finance the proposed RES on its own through the sale of revenue bonds, but by mid-1975, it became apparent that Akron's RES revenue bonds would not be marketable due to the novelty of RES technology and the ill effects of the New York City financial crisis on the capital markets. Consequently, Akron asked the OWDA to finance the project.

OWDA is mandated by law to implement "the public policy of the State . . . to provide . . . efficient and proper methods of disposal, salvage and reuse of or recovery of resources from solid waste . . ."6/ To effect its mandate, the Ohio

---

6/ Ohio Rev. Code Ann. § 6123.03 (Page's 1977).

General Assembly has vested OWDA with power to finance solid waste projects by issuing revenue bonds, and in conjunction with such projects and their financing, to enter into cooperative agreements with other governmental agencies containing such terms as are necessary to safeguard ". . . the respective interests of the parties thereto . . ."7/

After concluding that Akron's proposed RES would further the state policy OWDA has been mandated to implement, OWDA agreed to finance the project and in July 1976, the investment banking firm of Dillon, Reed & Co. agreed to head an underwriting team to purchase and resell the OWDA's RES bonds. OWDA and its underwriters concluded that in order to market the revenue bonds, it would be necessary to assure the bondholders that

---

7/ Ohio Rev. Code Ann. § 6123.13 (Page's 1977).

the RES project would receive an adequate supply of waste in order to provide adequate revenues to repay the bonds; and that to do so, it would be necessary for Akron to exercise its home-rule power to require that all solid waste generated within its limits be taken to the RES facility for disposal. The OWDA also wanted all of Akron's solid waste to be processed through the RES plant, rather than deposited in some landfill, to further its interest in cleaning up the environment.

In October 1976, Akron's City Council authorized a cooperative agreement with OWDA. Section 5.5 I of this agreement provides, among other things, that Akron covenants with OWDA as follows:

> "I. For the term of this Agreement, [Akron] shall require that all collectors and haulers of Solid Waste within [Akron] be licensed by [Akron] and all such licenses shall provide that all collectors or haulers of Solid Waste shall dispose of all Solid Waste generated within the

> corporate limits of [Akron] which is acceptable for disposal by the Project to be deliverd to the Project for disposal through the Project . . . [Akron] will take all available action, administrative, judicial and legislative, to cause all Solid Waste generated within the corporate limits of [Akron] . . . to be delivered to the Project for disposal through the Project."

To fulfill its obligations under this covenant, Akron enacted Ordinance No. 846-1976 which provides, in pertinent part:

> "From and after the date on which [the RES] plant begins accepting rubbish for disposal, all rubbish collected within the corporate limits of the City by the holder of a rubbish haulers license shall be deposited at such plant; . . ."

The ordinance does <u>not</u> apply to source-segregated recyclable materials - i.e., waste paper, cardboard, metals, etc. - segregated for recycling or other use by the preson generating the waste. It only applies to mixed solid waste put out by the generator thereof for disposal.

This ordinance has been challenged on antitrust grounds, among others. Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N.D. Ohio 1979), appeal docketed sub nom. Hybud Equipment Corp. v. City of Akron, No. 80-3121 (6th Cir. Jan. 14, 1980).

This antitrust attack on the actions of Akron and OWDA was made in spite of federal and Ohio precedents establishing that ordinances monopolizing or otherwise controlling the collection and/or disposal of solid waste within municipalities are proper police power measures that do not violate the Fourteenth Amendment. E.g., California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 319-22 (1905); Gardner v. Michigan, 199 U.S. 325, 332-33 (1905); State, ex rel. Moock v. Cincinnati, 120 Ohio St. 500, 508-09, 166 N.E. 583, 585-86, cert. denied, 280 U.S. 578 (1929); Canton v. Van Voorhis, 61 Ohio App. 419, 421-22, 22

N.E.2d 651, 652, appeal dismissed for want of debatable question, 135 Ohio St. 319, 20 N.E.2d 720 (1939). Moreover, Ohio courts have unequivocally declared that ordinances directing the flow of solid waste to a single hauler or disposal site are proper exercises of the sovereignty granted to municipalities by the home-rule provision of the Ohio Constitution. Moock v. Cincinnati, supra; Canton v. Van Voorhis, supra.

Although the sovereign, home-rule acts of Akron should not have been the subject of antitrust claims, Parker v. Brown, 317 U.S. 341 (1943), such litigation was commenced under the decision in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

These amici do not occupy a unique position. Local governments across the country for many decades have, under local police power, limited the collection or

disposal of rubbish. See, e.g., Silver v. Los Angeles, 217 Cal.App.2d 134, 31 Cal.Rptr. 545, 549-50 (1963); State v. Orr, 68 Conn. 101, 35 A.770, 771 (1896); United Sanitation Services, Inc. v. Tampa, 302 So.2d 435, 436 (Fla.Ct.App. 1974); Strub v. Deerfield, 19 Ill.2d 401, 167 N.E.2d 178, 180 (1960); Indianapolis v. Ryan, 212 Ind. 447, 7 N.E.2d 974, 976 (1937); O'Neal v. Harrison, 96 Kan. 339, 150 P.551 (1915); State v. Robb, 100 Me. 180, 60 A.874, 877 (1905); In re Vandine, 23 Mass. (6 Pick) 187, 17 Am. Dec. 351 (1827); Wheeler v. City of Boston, 233 Mass. 275, 123 N.E. 684, 686 (1919); Grand Rapids v. DeVries, 123 Mich. 570, 82 N.W. 269, 273-74 (1900); Valley Spring Hog Ranch Co. v. Plagman, 282 Mo. 1, 220 S.W.1, 4-5 (1920); Dover Township v. Witt, 7 N.J. Super. 259, 72 A.2d 884, 885 (1950); Marangi Brothers v. Board of Commissioners, 33 N.J. Super. 294, 110 A.2d

131, 138-39 (1954); People v. A & C Trucking Co., 88 Misc. 2d 988, 390 N.Y.S.2d 987, 992-94 (1977); Burns v. City of Enid, 92 Okla. 67, 217 P.1038, 1039 (1923); Spokane v. Carlson, 73 Wash. 2d 76, 436 P.2d 454, 456 (1968).

Similarly, municipalities have traditionally enacted mandatory sewer connection ordinances. See, e.g., Hutchison v. Valdosta, 227 U.S. 303 (1912); District of Columbia v. Brooke, 214 U.S. 138, 148 (1909); Hodge v. Stout, 377 F.Supp. 131, 135 (E.D. Tenn. 1974); People v. Butcher, 28 Misc.2d 24, 209 N.Y.S.2d 723, 728 (1960); Brandel v. Lawrenceburg, 249 Ind. 47, 230 N.E.2d 778, 781 (1967); Sikeston v. Sisson, 363 Mo. 104, 249 S.W.2d 345, 346-47 (1952).

As the discussion above demonstrates, municipalities often take governmental action, sometimes in cooperation with other levels of government, which might give rise

to antitrust litigation. A clear pronouncement that local governmental action under home-rule provisions may not give rise to antitrust liability is needed. Without such a clear rule, local governments will be deterred from many actions, rationally designed to promote the public health, safety and welfare, for fear of the enormous costs of antitrust litigation. Requiring cities to run the risk of antitrust suits arising from their governmental actions is an unnecessary additional cost for local governments already at the breaking point. Moreover, the delay which potential antitrust considerations would impose could seriously jeopardize the health and safety of local citizenry in the community facing a need to solve a sewage or solid waste disposal problem. The overall detrimental affect on the health and safety of millions of people throughout the nation cannot be overstated.

CONCLUSION

These amici urge an affirmance for the foregoing reasons. Local governmental actions pursuant to home-rule power allocated to municipalities by the people of a state should be no more subject to antitrust challenge than actions pursuant to other allocations of power to a state's legislature or judiciary.

Respectfully submitted,

SQUIRE, SANDERS
& DEMPSEY
JOHN D. CUMMINS
GLENN M. YOUNG
Counsel of Record
21 Dupont Circle, N.W.
Washington, DC 20036
(202) 862-7000

EBEN G. CRAWFORD
WILLIAM H. BAUGHMAN
1800 Union Commerce
Building
Cleveland, OH 44115
(216) 696-9200

Attorneys for the Ohio Water
Development Authority

ROBERT D. PRITT
Director of Law
City of Akron
304 Municipal
Building
Akron, Ohio 44308
(216) 375-2030

Attorney for the
City of Akron